IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.421 OF 2006

Oil & Natural Gas Corporation Ltd. ...Petitioner.

vs.

Essar Shipping Limited. ...Respondent.

Mr.D.R.Zaiwala., Sr. Counsel with P.A.Sawant and S.A.Bhalwal i/b. M/s.Vyas & Bhalwal, for Petitioner.

Mr.S.Mukharjee with S.Shah and A.G.Purohit, for Respondent.

CORAM: D.K.DESHMUKH, J.

DATED: 30th November,2006..

P.C.:-

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, the petitioner challenges the Award made by the arbitral tribunal directing the petitioner to make certain payment to the respondent. Before the arbitral tribunal, the respondent was the claimant. The first objection to the Award is on the ground of

limitation. According to the petitioner, the claim was barred by the law of limitation. The second ground of challenge is that interpretation placed by the arbitral tribunal on the term "operating cost" found in sub-clause 11.8 is not proper. The third ground of challenge is that according to the terms of the contract items which were received on the vessel were required to be countersigned by the representative of the petitioner and then only the cost of those items could be claimed. But the items in relation to which the claim was made the receipt of those items on the vessel was not countersigned by the representative of the Commission and therefore, the petitioner-Commission could not have been directed to reimburse the cost of those items. The fourth ground of challenge is that the petitioner was liable to reimburse the cost of only four items which are consumed during the contract period and therefore, it was for the respondent to establish that the items in relation to which the cost was claimed were consumed during the contract period.

2. So far as the first ground is concerned, it is submitted by the learned Counsel appearing for petitioner that the period of limitation for the claim made by the respondent would be governed by Article 12 of the Schedule of the Limitation Act. Article 12 of the Schedule of the Limitation Act reads as under:-

"12. For the hire of animals, vehicles, Three years When the hire

becomes

boats or household furniture. payable.

According to the learned Counsel appearing for petitioner, the arbitral tribunal in paragraph 42 of the Award has rejected the contention of the petitioner that the period of limitation would be governed by Article 12 of the Schedule of the Limitation Act. The finding recorded by the arbitral tribunal reads as under:-

> "42. As regards the question of which Article of the Schedule to the Limitation Act is applicable to the present claim, we are of the considered opinion that Article 12 is not applicable. Contract C-5021 was a contract for hiring MSVs. By no stretch of imagination can a Multi-purpose Support Vehicle be included in the term 'boat' used in Article 12. In any event, the claim is not in relation to hire charges. Rather it relates to FEV compensation/reimbursement for payments made for various services/facilities provided on board the MSV, including services provided by expatriate divers, the hiring of necessary equipment etc. The Claimant has already stated that it has received payment of hire charges and hence, Article 12 of the Schedule to Limitation Act has no application to this claim."

The arbitral tribunal has, thus, recorded finding that firstly the multi purpose support vehicle which was engaged by the petitioner cannot be termed as "boat" and therefore, Article 12 of the Schedule of the Limitation Act is not applicable. It is a common ground before me that no material was produced before the arbitral tribunal to show as to what does the term "boat" mean and as to how the multi purpose support vehicle engaged by the petitioner amounts to "boat" within the meaning of Article 12 of the Schedule of the Limitation Act. It was claimed by the petitioner that the multi purpose support vehicle is a boat within the meaning of Article 12 of the Schedule of the Limitation Act and therefore, the burden was entirely on the petitioner to produce the material before the arbitral tribunal in support of its claim. Admittedly no such material was produced.

3. It was then contended that the arbitral tribunal has committed error in holding that the claim was made within the period of limitation because the letter of the petitioner dated 2.9.1998 shows that till that date the claims made by the respondent were under consideration of the petitioner and they were rejected only on 2.9.1998. The ground raised in the petition is that the letter dated 2.9.1998 does not amount to an acknowledgment. Perusal of the Award, however, shows that the arbitral tribunal has not held that the

letter dated 2.9.1998 amounts to an acknowledgment. What the arbitral tribunal has held is that the period of limitation in the present case is governed by Article 113 of the Schedule of the Limitation Act and according to the Article 113 of the Schedule of the Limitation Act the period of limitation commences when the right to sue accrues. According to the arbitral tribunal as till 2.9.1998 the petitioner did not tell the respondent that it is not going to make payment and that the claim made by the respondent is rejected by it, right to sue did not accrue till that date to the respondent and therefore, right to sue accrued to the respondent on 2.9.1998 and therefore, the reference made on 9.12.1998 will be within the period of limitation. Thus, the ground on the basis of which the finding recorded by the arbitral tribunal is challenged is totally misconceived. The petitioner assumed that the arbitral tribunal has treated the letter dated 2.9.1998 as the acknowledgment for extension of period of limitation. Thus, the ground on which the finding recorded by the arbitral tribunal that the claim of the respondent is within the period of limitation is challenged, cannot be accepted.

4. So far as the second ground is concerned, perusal of the Award shows that for the purpose of construing the amended sub-clause 11.8 of the Contract between the parties, the arbitral tribunal has taken into consideration amended and unamended provisions of

sub-clause 11.6, amended and unamended provisions of sub-clause 11.8 as also the provisions in Article 2.17 of the contract between the parties, and after considering all those provisions in the contract the arbitral tribunal has held that sub-clause 11.8 cannot be taken into mean that it restricts the meaning of the term "operating cost" to mean only the cost of consumables, spares and expatriate fees. Perusal of the Award shows that the arbitral tribunal has also considered Article 2.17 which is the definition clause of the contract which defines the term "established operating cost". After having heard the learned Counsel appearing for both the sides, and after having gone through the Award and various terms of the contract, in my opinion, it cannot be said that the construction placed by the arbitral tribunal on clause 11.8 is impossible. The learned Counsel appearing for petitioner showed me the correspondence between the parties preceding the amendment of clause 11.8. After having gone through that correspondence also I do not find that it is impossible to reach the conclusion which is reached by the arbitral tribunal in relation to the construction to be placed on the provisions of of sub-clause 11.8. In my opinion, what is contained in Article 2.17 is crucial and the arbitral tribunal has rightly placed its reliance on Article 2.17 of the contract between the parties. In my opinion, therefore, for this reason the Award cannot be disturbed.

5. So far as the third ground is concerned, the arbitral tribunal has held that the requirement of the counter signature for receipt of the items on the vessel is not the mandatory requirement. The purpose of counter signature of a representative of the petitioner was introduced to ensure that the items in relation to which the claim is made is actually received on the vessel. The arbitral tribunal has held that considering the documents from the Customs authorities it can be said that the requirement is substantially complied with. The Arbitral Tribunal has also considered the position that the items may be received on the vessel during the off-hire period when the representative of the petitioner may not be present on the vessel, but that item may be actually consumed or used during the contract period. After having heard the learned Counsel appearing for the petitioner on this aspect of the matter, I find that the conclusion that is reached by the arbitral tribunal is a possible conclusion.

6. So far as the last ground of challenge is concerned, according to the petitioner, items i.e spares and consumables in relation to which the claim was made have not been proved to have been used or consumed during the contract period. Perusal of the Award shows that the arbitral tribunal has rejected this contention urged on behalf of the petitioner by making following observations in paragraph (B.4).:-

> "It is also apparent from the minutes of the joint meetings, that there was no dispute regarding the fact that the spares and consumables referred to in these claims were utilized for contractual operations, and that therefore, they were not utilized during the dry-dock/off-hire period. Consequently we reject the above contentions of the Respondent on this score"

It is clear from the above quoted observation that the arbitral tribunal has rejected the contention of the petitioner that spares and consumables in relation to which the claim was made were not actually used or consumed during the contract period, on the ground that during the currency of the contract when the joint meetings between the parties were taking place from time to time this grievance was never made by the petitioner. Therefore, in my opinion, a successful challenge to this finding can be raised only by pointing out the minutes of joint meetings where the petitioner raised an objection that some of the items in relation to which the claim is made were not actually used or consumed during the contract period. Perusal of the ground in the petition on which the reliance is placed by the petitioner shows that the petitioner relies on the minutes of the meeting where the respondent agreed that it will not make any claim in relation to the consumables and spares which were consumed and used during the

dry dock period. During the course of hearing I was also not pointed out minutes of any joint meeting between the parties where on behalf of the petitioner an objection was raised that all or some of the items in relation to which the claim is made were not actually consumed or used for contractual period. Taking overall view of the matter therefore, it is clear that the Award is well considered award and the contentions raised on behalf of the petitioner have been taken into consideration by the arbitral tribunal and the arbitral tribunal has recorded its finding after giving detail reasons for their findings. Considering the extremely limited jurisdiction conferred on the Court by Section 34 of the Arbitration and Conciliation Act to interfere with the Award, in my opinion, the petition cannot be entertained. Hence, it is rejected.

No order as to costs.